BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Idaho Public Utilities Commission	)	
	)	CC Docket 98-221
Petition for Rulemaking Pursuant to Section 251(h)(2) of the Communications Act	)	

OPPOSITION OF TIME WARNER TELECOM

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OPPOSITION OF TIME WARNER TELECOM

Time Warner Communications Holdings Inc. d/b/a Time Warner Telecom ("TWTC"), by its attorneys, hereby submits the following comments in opposition to the petition filed by the Idaho Public Utilities Commission ("Idaho Commission") requesting the adoption of a rule which provides for the treatment of CTC Telecom, Inc. ("CTC"), a local exchange carrier which plans to offer telephone exchange service to a new planned community located within U S WEST Communication, Inc.'s study area, and all "similarly situated" LECs, as "incumbent local exchange carriers" (ILECs), pursuant to Section 251(h)(2) of the Communications Act.[1]

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1 Idaho Public Utilities Commission Petition for Declaratory Ruling Concerning Section 251(h)(2) of the Communications Act ("Petition"), filed November 23, 1998. In its December 8, 1998 Public Notice, this Commission indicated that it would treat the Idaho Commission's request for a declaratory ruling as a Petition for Rulemaking. See Public Notice, "Pleading Cycle Established for Comments on Idaho Public

I. INTRODUCTION AND SUMMARY

Section 251(h)(2) grants the FCC discretionary authority to adopt rules providing for the treatment of a particular LEC, or "class or category thereof", as an ILEC for purposes of Section 251, upon a finding that:

> (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in [Section 251(h)(1)];
>
> (B) such carrier has substantially replaced an incumbent local exchange carrier described in [Section 251(h)(1)]; and
>
> (C) such treatment is consistent with the public interest, convenience and necessity and the purposes of [Section 251].[2]

The practical effect of such a determination is to subject the affected LECs to the additional regulatory obligations imposed on ILECs under Section 251(c) of the Communications Act.[3]

In its 1996 order adopting rules implementing the provisions of Section 251, the Commission concluded that it would be inconsistent with the statute to allow states to impose these additional obligations on LECs which do not fall within the definition of an ILEC established in Section 251(h)(1), absent a determination by the Commission that the criteria established in

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Utilities Commission Petition for Rulemaking Pursuant to Section 251(h)(2) of the Communications Act," CC Docket No. 98-221, DA 98-2510, released December 8, 1998.

2 47 U.S.C. § 251(h)(2).

3 47 U.S.C. § 251(c).

Section 251(h)(2) have been met.[4] The Commission's Part 51 rules permit a state commission or other interested party to request that this Commission make such a determination.[5] However, the Commission has stated that "we will not impose incumbent LEC obligations on non-incumbent LECs absent a clear and convincing showing" that the statutory criteria for such action has been satisfied.[6]

As the discussion below indicates, the Idaho Commission's petition wholly fails to make the "clear and convincing showing" necessary to justify the imposition of ILEC Section 251(c) obligations on CTC or other members of the potentially broad class of local service providers which might be deemed to fall within the scope of its proposed rule. Nor does the Commission's decision to impose ILEC obligations on the Guam Telephone Authority (GTA) provide any basis for the expansive ruling requested by the Idaho Commission. Indeed, the analysis of Section 251(h)(2) contained in the Commission's 1997 Notice of Proposed Rulemaking and 1998 Report and Order in the GTA

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4 In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, 16109-16110, ¶¶ 1247-1248 (1996) ("Local Competition Order"); also see 47 C.F.R. § 51.223(a).

5 47 C.F.R. § 51.223(b).

6 Local Competition Order, 11 FCC Rcd at 16110, ¶ 1248.

proceeding[7] provides further evidence that adoption of the broad ruling proposed in this proceeding is inappropriate.

In the absence of the requisite showing that the statutory criteria has been met and particularly given the significant adverse impact which adoption of the proposed rule is likely to have on efforts by new entrants to deploy local network facilities and gain a foothold in the local exchange business currently dominated by the RBOCs and other well-entrenched incumbent LECs, as defined in Section 251(h)(1), the Idaho Commission's petition must be rejected.

II. THE IDAHO COMMISSION'S PETITION FAILS TO DEMONSTRATE THAT THE CRITERIA ESTABLISHED IN SECTION 251(h)(2) HAVE BEEN SATISFIED.

A. Section 251(h)(2)(A)

As the Idaho Commission acknowledges, in order for this Commission to determine that it is appropriate to treat CTC or another "similarly situated" new entrant as an ILEC for purposes of Section 251, the Commission must find that the new entrant

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7 Declaratory Ruling and Notice of Proposed Rulemaking, In the Matters of Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h) of the Communications Act and Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, CCB Pol. 96-18, CC Docket No. 97-134, 12 FCC Rcd 6925 (released May 19, 1997) ("Guam Ruling/NPRM"); Report and Order, In the Matter of Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers Under Section 251(h)(2) of The Communications Act, CC Docket 97-134, 12 CR 1292 (released July 20, 1998) ("GTA Report and Order").

"occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in [Section 251(h)(1)]."[8] Clearly, the most relevant ILEC for purposes of making such a comparison in the case of CTC is U S WEST, the carrier whose own study area includes the planned development which CTC has contracted to serve.[9] In the Guam decision cited by the Idaho Commission in its petition,[10] the Commission notes that in addition to occupying a "dominant position" in the relevant local exchange market, ILECs typically "possess economies of density, connectivity, and scale that make efficient competitive entry quite difficult, if not impossible, absent compliance with the obligations of Section 251(c)."[11]

U S WEST, without doubt, possesses all of these characteristics in significant measure. However, it is equally obvious that CTC's provision of local exchange service to a planned development that includes approximately 900 residences and related small businesses does not give it anywhere near the "economies of density, connectivity, and scale" possessed by U S WEST. Nor does the Petition demonstrate that CTC's deployment of local network facilities within the planned

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8 47 U.S.C. § 251(h)(2)(A).

9 See Petition at ii.

10 Id. at 8.

11 Guam Ruling/NPRM, 12 FCC Rcd at 6941, ¶ 26, citing Local Competition Order, 11 FCC Rcd at 15505-12 ¶¶ 1-20.

development would operate to foreclose or deter competitive entry to a degree that warrants imposition of the additional regulatory obligations imposed on U S WEST and other incumbent LECs under Section 251(c).

According to the Petition, U S WEST already has some facilities providing service to customers in the general vicinity of the new development.[12] Moreover, CTC remains subject to a number of interconnection, access, resale, and other regulatory obligations, set forth in Sections 251(a)-(b), which are applicable to all LECs.[13] In addition, there may well be private contractual provisions, included in CTC's agreement with the development in question or in other such agreements, which serve to alleviate concerns regarding the cost/quality of service and the ability of residents and businesses to secure access to competitive alternatives.[14] (The Petition itself provides no details whatsoever concerning the terms of the "exclusive contract" between CTC and the Hidden Springs Development.)

Accordingly, the Idaho Commission's Petition plainly fails to provide a "clear and convincing showing" that CTC or any other "similarly situated" non-incumbent LEC should be deemed to be

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12 Petition at 1-2.

13 47 U.S.C. § 251(a)-(b).

14 To the extent CTC is (as it will be) heavily dependent on U S WEST for interconnection and access to the public switched network, this dependence will serve as a further check on potential anticompetitive behavior.

"comparable" to U S WEST or other incumbent LECs, as defined in Section 251(h)(1), and subjected to the additional obligations imposed on ILECs under Section 251(c).

B. Section 251(h)(2)(B)

Under Section 251(h)(2)(B), a non-incumbent LEC also must have "substantially replaced" an incumbent local exchange carrier in order for the Commission to treat the non-incumbent as an ILEC.[15] In its petition, the Idaho Commission cites this Commission's finding, in its NPRM in the GTA proceeding, that the term "replace" means "to take the place of: serve as a substitute for or successor of: SUCCEED, SUPPLANT."[16] The Petition then asserts that CTC "serves as a substitute and supplants U S WEST, the incumbent LEC, in U S WEST's existing study area," solely on the basis that "U S WEST's study area includes the Hidden Springs Development," and that CTC therefore satisfies the second prong of the Section 251(h)(2) standard.[17]

Under this line of reasoning, the criteria set forth in Section 251(h)(2)(B) would be satisfied whenever a new entrant provides local exchange service to even a single new residence or business not previously served by the incumbent LEC but located

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15 47 U.S.C. § 251(h)(2)(B).

16 Guam Ruling/NPRM, 12 FCC Rcd at 6942, ¶ 28, citing Webster's Third New International Dictionary of the English Language Unabridged (1993) at 1925.

17 Petition at 9.

within the ILEC's service area. Such a reading, if adopted, would trivialize the language of the statute, and render the statutory requirement that the non-incumbent must have "substantially replaced" the ILEC meaningless. Clearly, Congress cannot have intended such a result.

In analyzing Section 251(h)(2)(B) in the GTA proceeding, the Commission again focused on the fact that GTA, as the sole provider of local exchange service on the entire island of Guam, appeared to possess the "dominant market presence", as well as all of the other "advantages of incumbency" which are characteristic of incumbent ILECs, as described in Section 251(h)(1), including "substantial financial resources" and "significant economies of density, connectivity, and scale."[18] However, as the discussion of Section 251 (h)(2)(A) above indicates, the Commission clearly cannot conclude on the basis of the facts described in the Petition, that CTC is "comparable" to or has "substantially" replaced or eroded the position of U S WEST in this regard.

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18 Guam Ruling/NRPM, 12 FCC Rcd at 6944, ¶ 33.

C. Section 251(h)(2)(C)

In addition to demonstrating that a non-incumbent LEC occupies a position in the local market "comparable" to that occupied by the incumbent LEC and that the non-incumbent has "substantially replaced" the incumbent, a party seeking to impose Section 251(c) obligations on the non-incumbent LEC must make a "clear and convincing showing" that such treatment is consistent with the "public interest, convenience, and necessity", as well as the purposes of Section 251.[19] The central thrust of Section 251, of course, is to establish a regulatory framework which makes it possible for new entrants to compete with the entrenched incumbent LECs described in Section 251(h)(1).

As the discussion in Sections I.A. and B. above demonstrates, the information and arguments presented in the Idaho Commission's petition fail to demonstrate that a non-incumbent LEC's provision of local exchange service to customers in a new subdivision or planned community within the incumbent LEC's service area, pursuant to a private contractual arrangement of the sort which CTC has negotiated with Hidden Springs, inevitably places the non-incumbent LEC in a position of market dominance comparable to that of an entrenched incumbent LEC such as U S WEST. Nor does it demonstrate that such arrangements pose inherent risks to the competitive marketplace which existing LEC

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19 47 U.S.C. § 251(h)(2)(C); also see Local Competition Order, 11 FCC Rcd at 16110, ¶ 1248.

regulatory obligations and market forces cannot address, and which are so substantial as to justify a broad rule that subjects all LECs who are parties to such arrangements to the full range of additional regulatory obligations imposed on incumbent LECs under Section 251(c).

Indeed, the Idaho Commission appears to recognize that its petition falls short of making the requisite "clear and convincing showing" that its proposed rule meets the statutory standard, as it asserts merely that "treating CTC as an incumbent LEC may well be a prerequisite for the development of competition in this community."[20] The Idaho Commission's later assertion that "[i]n fact, failure to treat CTC as an incumbent LEC for the purposes of Section 251(c) would stifle competition and encourage other LECs to contract for exclusivity in newly constructed self contained communities"[21] wholly ignores the economics of the marketplace, as well as the impact of existing LEC regulatory obligations (and the threat of additional regulation) on the behavior of new entrants.

Developers, residents, and businesses within new planned communities such as the Hidden Springs Development have no incentive to enter into "exclusive" arrangements which leave them wholly at the mercy of a new non-incumbent LEC. Any assumption that such private contractual arrangements will

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20 Petition at 10. [emphasis added]

21 Id.

inevitably result in the foreclosure of competition is therefore fundamentally flawed. In all likelihood, such an arrangement will only be negotiated (or renewed) after it is clear that the non-incumbent LEC is offering better service and/or lower prices than other potential service providers, including the incumbent LEC. Moreover, to the extent the contracting LEC fails to perform as promised, the entrenched incumbent LEC and, quite possibly,[22] other new entrants will stand ready to fill the void. In any event, the contracting LEC will remain subject to interconnection, access, resale, and other regulatory obligations pursuant to Section 251(a)-(b), as well as the threat of full-scale ILEC regulation pursuant to Section 251(c), should circumstances arise which clearly satisfy the criteria for Commission action under Section 251(h)(2).

In contrast, the immediate adoption of a broad rule which potentially subjects any LEC that enters into an "exclusive contract" to the full range of obligations imposed on incumbent LECs under Section 251(c) is likely to deter many new entrants from even attempting to enter into arrangements which call for the deployment of facilities and services to new developments in geographic areas not presently served by the incumbent LEC.[23]

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22 In most cases, as in this instance, the incumbent LEC will have at least some existing facilities located in the vicinity of the new development.

23 See Local Competition Order, 11 FCC Rcd at 16109, ¶ 1247, n.3055, citing comments submitted to the Commission indicating that the imposition of Section 251(c) requirements on new entrants would "raise costs and thereby

This would be both unfortunate and ironic, given that the core purpose of the Telecommunication Act of 1996 was "to provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans. . . .[24] To the extent that non-incumbent LECs are discouraged from deploying local network infrastructure that can be used to compete with incumbent LECs, within newly-developed areas and potentially in other areas already served by the ILEC, residential and business customers will be denied the benefits arising from the presence of an additional facilities-based service provider[25] and the pro-competitive purposes of the 1996 Act as a whole and Section 251 in particular will be thwarted, rather than advanced.

III. THE COMMISSION'S DECISION IN THE GTA PROCEEDING PROVIDES NO BASIS FOR ADOPTION OF A BROAD RULE IMPOSING ILEC OBLIGATIONS ON NON-INCUMBENT LECS.

In its Petition, the Idaho Commission suggests that this Commission's decision in the GTA proceeding somehow "dictates" that CTC and, presumably, other non-incumbent LECs offering service to new developments and planned communities in areas not

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discourage potential competitors from entering the local market."

24 See House-Senate Conference Report, Telecommunications Act of 1996, S. Rep. No. 104-230, 104th Cong., 2d Sess. (1996) ("Conference Report") at 1.

25 Indeed, it is conceivable that requiring non-incumbent ILECs to incur the added costs of Section 251(c) compliance may cause some areas to remain unserved.

previously served by the incumbent LEC, pursuant to arrangements similar to CTC's agreement with Hidden Springs, must be treated as ILECs for purposes of Section 251.[26] However, the circumstances which led the Commission to adopt a rule treating GTA as an incumbent LEC pursuant to Section 251(h)(2) were demonstrably different in a number of respects from those at issue in this proceeding.

As an initial matter, the Commission's Report and Order in the GTA proceeding expressly notes that "[a]ll seven of the commenters that address the issue -- <u>including GTA</u> -- support our proposal to adopt a rule pursuant to Section 251(h)(2) treating GTA as an incumbent LEC for purposes of section 251."[27] In addition, as the Commission repeatedly observed, GTA was created by the Territory of Guam in 1973 to provide local exchange and exchange access to the Territory,[28] and at the time of the Commissions' ruling was the "<u>only</u> LEC throughout Guam."[29] The size and scope of GTA's local telephone operations, which as of 1995 constituted "the twenty-ninth largest local telephone network in the United States,"[30] as well as its status as the <u>only</u> LEC on Guam, clearly distinguishes it from CTC, which

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26 <u>See</u> Petition at 10-11.

27 <u>GTA Report and Order</u>, 12 CR at 1294, ¶ 5. [emphasis added]

28 <u>Guam Ruling/NPRM</u>, 12 FCC Rcd at 6930, ¶ 6.

29 <u>GTA Report and Order</u>, 12 CR at 1293, ¶ 2. [emphasis added]

30 <u>Guam Ruling/NPRM</u>, 12 FCC Rcd at 6931, ¶ 6.

proposes to provide local service to 900 homes and an unspecified number of businesses in one small area located within U S WEST's study area.[31] GTA itself observed that its situation was "virtually unique and clearly not contemplated by Congress when considering Section 251," and acknowledged that in light of its size and status as the sole provider of local service on Guam it is "certainly comparable to incumbent LECs."[32] In light of this unique situation, the Commission declined to extend its ruling to any other LECs, concluding that "the record does not indicate that any LEC situated similarly to GTA exists."[33]

Accordingly, the Commission's ruling under Section 251(h)(2) with respect to GTA clearly does not "dictate" that the Commission must grant the Idaho Commission's request for a similar determination with respect to CTC or other non-incumbent LECs engaged in activities of the sort described in the instant Petition. Moreover, as the discussion in Section I above indicates, if anything, the analytical approach adopted by the Commission in the GTA proceeding in fact tends to reinforce the notion that the imposition of Section 251(c) obligations in this proceeding is inappropriate, in the absence of a "clear and convincing showing" that CTC and other non-incumbent LECs

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31 In contrast, by 1995, GTA was the sole provider of local service to more than 130,000 residents of Guam, serving approximately 67,000 access lines. Id.

32 GTA Report and Order, 12 CR at 1294, ¶ 5.

33 Id. at 1295, ¶ 9.

potentially affected by the proposed rule possess market power and "substantial economies of density, connectivity, and scale", comparable to those possessed by GTA, U S WEST, and other entrenched incumbent LECs.[34]

IV. <u>THE COMMISSION SHOULD REAFFIRM THAT STATES MAY NOT IMPOSE ILEC OBLIGATIONS ON NON-INCUMBENT LECS ABSENT A DETERMINATION BY THE COMMISSION PURSUANT TO SECTION 251(h)(2).</u>

In its Local Competition Order, the Commission determined that "states may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly imposes only on incumbent LECs,"[35] and adopted a rule which explicitly provides that:

> A state may not impose the obligations set forth in Section 251(c) of the Act on a LEC that is not classified as an incumbent LEC, as defined in Section 251(h)(1) of the Act, unless the Commission issues an order declaring that such LEC or classes or categories of LECs should be treated as incumbent LECs.[36]

However, in its Petition, the Idaho Commission states that it "is not conceding that the Commission has broad authority to preempt state utility commissions from imposing additional interconnection and access requirements on LECs that are not classified as incumbent LECs, as defined by Section 251(h)(1) of the Communications Act, in the absence of a Commission finding

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34 <u>Guam Ruling/NPRM</u>, 12 FCC Rcd 6941, ¶ 27; 6944, ¶ 33; and 6948, ¶ 40.

35 <u>Local Competition Order</u>, 11 FCC Rcd at 16110, ¶ 48.

36 47 C.F.R. § 51.223(a).

that such additional requirements violate Section 253."[37] The Petition further asserts that "by promulgating 47 C.F.R. § 51.223, the Commission did not intend to preempt state utility commissions from imposing legitimate rules designed to promote competition and to protect the public interest in situations like the one facing the Commission in this Petition where the LEC in question stands in the same position as an incumbent LEC."[38]

For reasons described in Sections I and II above, it is clear that the Idaho Commission's Petition in fact does not demonstrate that CTC and other non-incumbent LECs engaged in similar "exclusive" arrangements inherently stand in the "same position" as the entrenched incumbent LECs and therefore, should be subject to additional regulatory obligations of the sort imposed on ILECs under Section 251(c) of the Act. Moreover, to the extent the Idaho Commission contends that states may impose such obligations unilaterally, without a determination by this Commission pursuant to Section 251(h)(2), its argument constitutes an untimely request for reconsideration of the Local Competition Order and the rules adopted therein, on the basis of arguments considered and rejected by the Commission in that proceeding.[39] The Commission should decline the Idaho

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37 Petition at 11.

38 Id. at 12.

39 See Local Competition Order, 11 FCC Rcd at 16108-16110, ¶¶ 1245-1248, specifically rejecting arguments advanced by ILECs and state commissions, based on the same provisions of the 1996 Act cited by the Idaho Commission in its Petition. The Court of Appeals' ruling in Iowa Utilities Board v. FCC,

Commission's invitation to revisit this issue, and instead should reaffirm its earlier determination that it would be inconsistent with the statute to permit states to impose on non-incumbent LECs obligations which the 1996 Act expressly imposes only on incumbent LECs, unless and until the Commission makes a determination that a particular non-incumbent LEC or class of LECs should be treated as ILECs, pursuant to Section 251(h)(2).[40]

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120 F.3d 753 (8th Cir. 1997), cert. granted sub nom., AT&T Corp. v. Iowa Utilities Board, 118 S.Ct. 879 (1998), did not address that portion of the Local Competition Order and the Commission's rules (i.e., 47 C.F.R. § 51.223) implementing Section 251(h)(2).

40 Id.

V. CONCLUSION

For the foregoing reasons, the Idaho Commission's Petition fails to justify the adoption of a rule imposing Section 251(c) obligations on CTC and other non-incumbent LECs. Accordingly, the Commission should decline to adopt the proposed rule, and should reaffirm that states may not impose ILEC obligations on non-incumbent LECs, absent a ruling by this Commission that the standard set forth in Section 251(h)(2) has been satisfied.

Respectfully submitted,

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January 11, 1999

CERTIFICATE

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